

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

FRIDAY, THE 25TH MAY 2007 /4TH JAISTHA 1929

Crl.Rev.Pet.No. 4401 of 2006(A)

CRA.466/2006 of SESSIONS COURT, ERNAKULAM

CC.1025/2004 of JUDL.MAGISTRATE OF FIRST CLASS-I, ERNAKULAM

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REVN. PETITIONER: APPELLANT/ACCUSED NO.2:

A.M. SADHIQ, AGED 41 YEARS,
MANAGING DIRECTOR, STAR MERCANTILE ENTERPRISES
(P)LTD., XL/3008, SYNAGOGUE LANE,
BASIN ROAD, ERNAKULAM, COCHIN-31.

BY ADV. SRI.P.N.RAVINDRAN
SRI.V.JOHN SEBASTIAN RALPH
SMT.PREETHY KARUNAKARAN
SMT.MEENA.A.
SMT.M.R.MINI
SRI.JAYKAR.K.S.

RESPONDENTS: COMPLAINANT:

1. INTERNATIONAL TRADE LINKS,
HOUSE NO.G.211, MAIN AVENUE,
PANAMPILLY NAGAR, ERNAKULAM, REPRESENTED
BY ITS PROPRIETOR, M.A.K. AZAD.

2. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, SESSIONS COURT
ERNAKULAM.

BY ADV. SRI.VARGHESE C.KURIAKOSE
SRI.PRAVEEN K. JOY
R2 BY PUBLIC PROSECUTOR MR. AMJAD ALI

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 22-2-2007 ALONG WITH CRL.R.P.NO.4396/2006 AND CONNECTED
CASES, THE COURT ON 25/05/1900 PASSED THE FOLLOWING:

ORDER ON CRL.M.A.NO. 12740/2006 IN CRL.R.P.NO. 4403 OF 2006-A

DISMISSED.

25-5-2007

SD/-K.R.UDAYABHANU, JUDGE

TRUE COPY

P.S.TO JUDGE

ORDER ON CRL.M.A.NO. 12747/2006 IN CRL.R.P.NO. 4406 OF 2006-A

DISMISSED.

25-5-2007

SD/-K.R.UDAYABHANU, JUDGE

TRUE COPY

P.S.TO JUDGE

ORDER ON CRL.M.A.NO. 12750/2006 IN CRL.R.P.NO. 4407 OF 2006-A

DISMISSED.

25-5-2007

SD/-K.R.UDAYABHANU, JUDGE

TRUE COPY

P.S.TO JUDGE

ORDER ON CRL.M.A.NO. 12761/2006 IN CRL.R.P.NO. 4409 OF 2006-A

DISMISSED.

25-5-2007

SD/-K.R.UDAYABHANU, JUDGE

TRUE COPY

P.S.TO JUDGE

K.R. UDAYABHANU, J.

CRL.R.P.NOS.4396,4401, 4403,
4406,4407 & 4409 OF 2006

DATED THIS THE 25th DAY OF MAY 2007

ORDER

The revision petitioner in the above matters is the 2nd accused, the Managing Director of the first accused company who stands convicted for the offence under Section 138 of the Negotiable Instruments Act and sentenced to undergo simple imprisonment for four months in each of the cases and to pay a compensation of Rs.38,40,000/- in C.C.No.985/2004; Rs.4,96,800/- in C.C.No.1022/2004; Rs.4,96,800/-in C.C.No.1023/2004, Rs.4,96,800/- in C.C.No.1024/2004; Rs.72,52,800/- in C.C.No.1025/2004 and Rs.4,96,800/- in C.C.No.1026/2004 vide Section 357(3) Cr.P.C. and in default of payment of compensation to undergo simple imprisonment for three months in each cases. The decision of the trial court convicting accused 3 and 4, the Directors of the Company was set aside by the appellate court as it was found that they had resigned from the Directorship before the date of the transaction

involved. A1 company stands sentenced to pay Rs.5000/- in each of the cases. The conviction and sentence imposed on A1 and A2 were confirmed.

2. The prosecution case is that the accused, a company engaged in the business of grain, sugar etc. incurred a liability towards the petitioner, a proprietary concern owned by PW1 and towards the amount due, the 2nd accused/revision petitioner, the Managing Director of the first accused company issued the respective cheques dated 1-3-2004, 28-2-2004, 28-2-2004, 28-2-2004, 1-3-2004 and 28-2-2004 for a sum of Rs.32,00,000/-, Rs.4,14,000/- Rs.4,14,000/-, Rs.4,14,000/-, Rs.60,44,000/- and Rs.4,14,000/- and Rs.4,14,000/- (C.C.Nos.985/04,1022/04,1023/04,1024/05 and 1026/05). The cheques when presented got dishonoured as the accounts were closed. Demand notice as stipulated by the statute was sent. The same was received, but no payments were made.

3. The evidence adduced in the matter consisted of the testimony of PW1, Exts.P1 to P66 and Dws. 1 and 2, Exts.D1 to D8, that included the copies of the alleged reply notices sent and the certificate issued by the Station House Officer as to the

receipt of complaint of loss of suit case containing the signed cheque leaves and the plain paper copy of the protest complaint filed and the F.I.R. registered in pursuance thereof. It is the version of the revision petitioner/2nd accused and that he had travelled along with the complainant/PW1 to Madras and enroute he lost his VIP suit case containing signed cheque leaves and the same was in fact taken away by PW1 and making false entries in the signed cheque leaves, the same were presented and the proceedings have been initiated. The courts below have concurrently held that the accused/revision petitioner/revision petitioners have totally failed to establish the case of stolen cheque leaves. It was particularly noted that the revision petitioner/2nd accused did not even testify. It is also noted that in the copies of the alleged reply notices the above case has not even been set up. DW1 is the official of the post office who was examined to establish the sending of reply notices. The evidence of DW2, who is A3, the brother of A2/revision petitioner is confined to his case that he had resigned from the Directorship of the Company prior to the date of the transaction. A4 who is the wife of A2 has also raised a similar case that she had also

resigned from the Directorship prior to the date of the transaction. The case put up while cross examining PW1 that A2/revision petitioner had travelled along with the complainant/PW1 in February 2004 and at the time he had lost the cheque leaves and the same has been misused by A2, stands totally not proved. The above case set up has been flatly denied by PW1. Even the complaint filed at the time before the police stands not properly proved as the Station House Officer was not examined and the copy of the above complaint was not produced/summoned. The Station House Officer was not examined to prove the certificate allegedly issued by him as to the receipt of the complaint. In pursuance of the protest complaint, the F.I.R.was registered only on 18-9-2005, i.e.subsequent to the commencement of the present proceedings. Hence, the courts below have rightly discarded the case set up by the accused, that he lost the cheque leaves and the same was misused by the complainant/PW1.

4. Counsel for the revision petitioner has only raised the following contentions:

(1)The complainant, i.e.International Trade Links is only a

proprietary concern and hence the same is not entitled in law to initiate the proceedings. The cause title mentions in the compliant as M/s. International Trade Links represented by its Proprietor M.A.K.Azad. It is the contention that the proprietor concern is not a juristic person and hence the proceedings are liable to be set aside.

5. Another contention raised is that Section 251 Cr.P.C.has not been complied with by the trial court and hence the matter has at least to be remitted. Another contention is that the amount awarded is excessive and works out to about 20% towards interest. It is impermissible.

6. As pointed out by counsel for the respondent herein it has to be noted that the above contentions were not raised before the courts below. The above contention has also not been raised in the revision petition memorandum. The revision petitioner has relied on the decisions in **C.G.Dassan v. Ranimol.S., 2002(2)K.L.J.111; Associated Cement Co.Ltd. v. Keshavanand,(1998)1 SCC 687, Sri Sivasakthi Industries v. A.M.Corp., 1992(1)KLT 493** and **Satish jayantilal Shah v. Pankaj Mashruwala and another, 1996**

Crl.L.J.3099 in support of the above contention. In **C.G.Dassan's case (op.cit)** the single Judge of this Court remitted the matter back as the complaint was filed by the individual although it stood in the name of the proprietary concern. The court held that the complainant has to establish that he is the proprietor of the concern in whose name the cheque was issued. I find that the ratio of the above decision would not help to sustain the case set up as in the instant case the proprietor as well as the proprietorship concern is mentioned in the cause title. The observations of the Supreme Court in **Associated Cement Co.Ltd. Case (op.cit)** is to the effect that the complainant must be a corporeal person who is capable of making physical presence in the court and that even if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court and it is that natural person who is looked upon for all practical purposes to be the complainant in the case. The court pointed out that it is not necessary to insist for the presence of a particular person whose statement was taken on oath at the first instance and that he

alone can continue to represent the company till the end of the proceedings. Dismissal of the complaint under Section 249 of the old Code as the particular person was represented was set aside. I find that the above decision does not support the case set up. Of course, the court has mentioned that the word "person" is defined in the Indian Penal Code (Section 11) as including "any company or association or body of persons whether incorporated or not". As per Section 2(y) of the new Code the words and expressions used in that Code but not defined herein can have the same meaning assigned to them in the Indian Penal Code. Thus when the word person is specifically defined in the Penal Code as including a company that definition can normally be adopted for understanding the scope of the word complainant. The court has also noted that the new Code mentioned also "unless the context otherwise requires".

7. In **Sri Sivasakthi Industries case (op.cit)** it was the accused who had raised the plea that the first accused is a proprietary concern and the 2nd accused its proprietor. The first accused had filed the application under Section 482 Cr.P.C. seeking to quash the proceedings. It was the contention that the

first accused being a proprietorial firm, it is not a separate legal entity apart from its proprietor and hence the prosecution against the petitioner/proprietor concern is not sustainable. The court held that the proprietorship concern and the proprietor is one and the same person and hence permitted to continue the proceedings against the 2nd accused although the proceedings against the first accused was quashed. I find that the above decision also is not apposite to the facts of the case. In the instant case, the proprietor is also mentioned in the cause title as the person who represent the proprietorship concern.

8. In **Satish Jayantilal Shah case (op.cit)** the single Judge of the Gujarat High Court held that a proprietary concern is not a legal entity or juristic person and hence it cannot initiate any proceedings nor proceedings be initiated against it and that it is only the proprietor who is an affected person who can either indict or be indicted. In the above case although the cheque was issued in the name of the proprietary concern by another proprietary concern but the proceedings were initiated by the proprietor of the payee concern against the proprietor of the drawer concern. The court held that the proceedings are

perfectly legal as the same has been initiated rightly by the complainant against the accused proprietor. The court held that a proprietary concern is the synonym for the proprietor. In fact the proprietor is the person who does business but for trading conveniences business is done in the name of proprietary concern. As noted above, in the instant case at hand the proprietary concern is represented by the proprietor although technically it can be said that it is the proprietary concern that it has initiated the proceedings.

9. Counsel for the respondent has relied on the decisions in **M/s. Eita India Ltd. v. N.C.T.of Delhi, 2002 CrI.L.J.4754** and the decision of the Supreme Court in **M/s. M.M.T.C.Ltd. v. M/s.Medchi Chemicals & Pharma(P)Ltd., A.I.R.2002 SC 182**. In M/s. Eita India Ltd. Case (op.cit) the single Judge of the Delhi High Court has observed that a proprietorship concern can also act. The court has quoted the decision in **Vishwa Mitter v. O.P.Poddar, (1983)4 SCC 701** that no court can decline to take cognizance on the ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special

provision for taking cognizance of such offences under the statute, then the complainant must satisfy the eligibility criterion prescribed in the statute. It was held that the only eligibility criterion prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. The court has observed that it is permissible for the courts to take into account the ostensible purposes or object and the real legislative intent. A bare mechanical interpretation of the words devoid of concept of purpose will render the legislative intent inane. The court set aside the order of the courts below dismissing the complaint filed by the company, i.e. M/s. Eita India Ltd as the sole proprietor of M/s. East India Transport Agency (EITA). Of course, the above case was filed by the proprietor. In **M/s. M.M.T.C.Ltd. Case (op.cit)** the Supreme Court has made observations to the effect that the only eligibility criterion prescribed by S.142 is that the complaint under S.138 must be by the payee or the holder in due course of said cheque. The court has quoted the observation from **Vishwa Mitter case (op.cit)** that any one can set the criminal law in motion.

10. I find that in the instant case the cheque is issued in the name of the proprietary concern. The account is in the name of the proprietary concern. The payee is the proprietary concern. The complainant is the proprietary concern represented by its sole proprietor. I find that virtually the complainant is the proprietor of the concern as the name of the proprietary concern is the synonym of the proprietor or selected for trading purposes. I find that the contention that the proprietary concern being not juristic person cannot initiate proceedings cannot be sustained as in the instant case as the proprietary concern is represented by the proprietor, a natural person. Hence, I find no merit in the above contention of the revision petitioner.

11. The other contention raised is that Section 251 Cr.P.C. has not been complied with and hence gross prejudice has been caused to the accused and the proceedings are liable to be set aside. I find, on a verification of the proceedings paper, compliance of Section 251 Cr.P.C. is not recorded. All the same in the judgment of the trial court it is specifically mentioned that the particulars of the offences were read over to the accused and

they have pleaded not guilty. The above statement has not been disputed in the appeal filed, nor was such a contention raised in appeal. In the circumstances, I find that the contention as such cannot be upheld. The decisions cited in support of the ground are in **Lallan Rai v.State of Bihar (2003)1 SCC 26.** **Ramachandran v. State of Kerala, 1987(1)K.L.T.421,** **Provident Fund Inspector v. Mohammed, 1980 K.L.T.698** **and Mathai v. State of Kerala, 1982 K.L.T.692,** I find that the same are not applicable in the above context and in view of Section 464 Cr.P.C. Further more, absolutely no prejudice has been caused to the accused/revision petitioner in the instant case as he has even filed an application for discharge at the initial stages and subsequently the defence evidence was also adduced. In the circumstances, I find that the above contention is de hors merit and is liable to be rejected.

12. It is also contended that the amount of compensation awarded is exorbitant. The revision petitioner has relied on the decision in **Sathyan Ayyappa v. Yousu and another, 2007(1) KLD (Cri)72** that only such amount can be directed to be paid which a civil court is competent to direct. As per Sections 18

and 117 of the Negotiable Instruments Act, interest can be awarded at the rate of 18% in the absence of a contract to the contrary. I find that as on date if calculated the amount awarded is less than the above percentage. Hence, the above contention is also devoid of merit. In the circumstances the conviction is confirmed.

Counsel has also sought for modification of sentence pleading that mandatory imprisonment may be avoided. In the circumstances, the sentence imposed on the revision petitioner/A2 is modified to imprisonment till the rising of the court. The revision petitioner is also granted six months time from today onwards to remit the amount of compensation. He shall appear before the Judicial First Class Magistrate Court-I, Ernakulam on 28-11-2007 to receive the sentence. The Crl.revision petitions are disposed of accordingly.

K.R.UDAYABHANU, JUDGE

ks.

